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Supreme Court of the United States

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v.

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APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1469

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; ROBERT MOSS, Chairman; and MIKE UTTECHT, HARRY A. SHAWBACK, FRANK COOK, DON ELLSWORTH JENSEN and GORDON JENSEN, Members of the Board of Fish and Game for the State of Alaska,

Appellants,

v.

JOHN BOZANICH, ANDY NESS, RUDOLPH PLANCICH, ALAN TAKALO and WILLIAM WHITE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

APPELLEES' MOTION TO DISMISS AND/OR AFFIRM

Appellees pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move that the appellants' appeal be dismissed and/or that the final decree of the District Court in this cause be affirmed on the grounds that the issues posed by appellants are so unsubstantial as not to warrant further argument.

STATEMENT

The defendants, Commissioner of Fish and Game f
the State of Alaska and the Fish and Game Board for th
state, have appealed from the decree,[1] supported by
unanimous opinion,[2] of the three-judge Alaska Distri
Court convened to hear plaintiff fishermen's injuncti
and declaratory relief action in Cause J-5-68. This ca
involves the use and licensing of salmon net fishing gea

The decree, entered March 20, 1969 (record on appe
document No. 52), denied the Commissioner's motion
dismiss and for a summary judgment, and granted th
fishermen's motion for summary judgment, declarin
Chapter 186 of the 1968 Session Laws of the State
Alaska and Section 102.09 of the 1969 Alaska Comme
cial Fishing Regulations unconstitutional under both th
Alaska and the United States Constitution, and enjoinin
the Commissioner *et al.*, from enforcing these provisio

In order to fish commercially for salmon in Alaska, a
applicant must secure a commercial fishing license a
in addition, must fish with licensed gear. The fisherma
holding the gear license must own or lease and personal
operate the gear, usually in conjunction with other co
mercial fishermen crew members (Alaska Statute Se
16.05.480 and 16.05.540 (Appx. p. 23).)

The coastal waters of Alaska are divided into 11 ge
graphical districts described as "salmon registration are
(Appx. p. A-26).

Chapter 186 and the supplemental regulations limit
the right to hold a commercial salmon fishing net ge

1. Appendix page A-1
2. Appendix page A-3

license in any given fishing area to those previously licensed in that area or to those who fished commercially for three years in the area, with additional provisions for so-called hardship and transfer within families. The statute is set forth in full as a footnote to the opinion below (Appx. p. A-4).

The pertinent portions of Chapter 186, SLA 1968 provide:

> "Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who
>
> "(1) has previously held a salmon net gear license for that specific salmon registration area; or
>
> "(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The effect of the statute is to create an exclusive fishing monopoly in the primary commercial fishing method in each registration area for those who qualify by prior participation under the terms of the statute.

The 1969 Alaska fishing regulations were even more restrictive in limiting a salmon net gear license for a specific area to those who either (A) held such a license in that area *in 1965* or subsequent years, or (B) actively engaged in commercial fishing in that area for any three years *since January 1, 1960.* (Appx. p. A-5, 6)

Under this statute and supplemental regulations, the plaintiffs, although experienced commercial fishermen who had held net gear licenses in other Alaska registration areas, were denied licenses in the areas of their

choice. The fishermen sued for injunctive relief and a declaration of unconstitutionality under both the Alaska and United States Constitution. The court below found the statute and regulations unconstitutional under both constitutions. The defendants have appealed, questioning the correctness of the decision based on the federal constitution and arguing that the court should not have considered the state constitutional issue, but they make no argument that the statute and regulations do not violate the state constitutional provisions.

I. The Decision of the Three-Judge District Court Is So Clearly Correct as to Present No Substantial Question for Review by the United States Supreme Court

Prior to the enactment of Chapter 186 of the Session Laws of Alaska, 1968, commercial fishing in Alaska was a common calling open to all fishermen. There were restrictions for conservation purposes on the geographical waters in which fishing was permitted, the times, the type of permissible gear and the fishermen were restricted each year to one of the eleven designated registration areas of their choice.[5] They did, however, have a free choice of areas and could plan their fishing effort accordingly, taking into consideration the annual variations and predicted size and locations of the expected runs of returning salmon.

This basic principle of substantial free choice and flexibility in one of Alaska's major means of livelihood was expressly carried forward into the provisions of the Alaska State Constitution.

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5. Appendix page A-25

Article VIII, Section 3 of the Alaska Constitution provides:

> "*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

Article VIII, Section 15 of the Alaska Constitution provides:

> "*No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

This provision was discussed by the then Attorney General of the State of Alaska in an opinion dated February 9, 1968,[6] which found unconstitutional proposed 1968 regulations essentially similar to the statute and regulations held unconstitutional in the opinion being appealed in this case.

The Attorney General's opinion stated, with reference to the above quoted Section 15:

> "However, perhaps the most pertinent provision of the Alaska Constitution is Article VII, Section 15 which provides:
>
> " 'No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.'
>
> "This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.
>
> "The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the fol-

6. Appendix page A-15

lowing commentary on Section 15 to the Convention:

"'Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. [Emphasis added] "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.'

"In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

"In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) the U.S. Supreme Court in interpreting the White Act stated:

"'"Exclusive," as used in Section 1 [of the White Act] . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few.' (*Supra* at 122)

"In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license."

The three-judge court below reached the same con-

clusion based on the same constitutional history and the application of the *Hynes v. Grimes Packing Co.* case, 337 U.S. 86 (1949).

Although the Commissioner and Board at pages 19 thru 21 of their Statement as to Jurisdiction contend that the determination of the state constitutional issues by the court below should be subject to appeal to the United States Supreme Court, they *nowhere* suggest or assert in their brief any contention as to wherein the reasoning and conclusion of the decision of the court below and the quoted opinion of the Alaska Attorney General in 1968 are in error in applying the "No Exclusive Right of Fishery" provisions of Section 15.

To support a contention that a "substantial question" exists warranting further argument in the United States Supreme Court, we submit that more is required than the mere assertion that the issue is important. The appellants must not only establish that the issue is important, but must also assert a substantial argument tending to establish error in the decision below. No such argument is made, nor does it otherwise appear that it could be made. The constitutional history of Section 15 and its plain language so clearly prohibit the exclusive right and special privileges granted by Chapter 186 as to put the matter beyond reasonable argument.

If the court below is correct in its application of the Alaska Constitution, then the decree below must be sustained even if the court's application of the Fourteenth Amendment of the United States Constitution might otherwise present a sufficient question to warrant judicial review. Consequently, Question 1 of appellants' State-

ment concerning application of the Fourteenth Amendment is not determinative of the case.

The District Court's application of the "equal protection of the laws" portion of the Fourteenth Amendment to the United States Constitution, and the comparable provisions of the Alaska Constitution under Article I, Section 1 "Inherent Rights," Section 7 "Due Process," and Article VIII "Uniform Application" in sustaining the decree is clearly correct and consistent with the only other cases to consider the issue under closely similar circumstances; *Brown v. Anderson,* 202 F.S. 96 (1962 three-judge D.C. Alaska) in which the court held invalid an Alaska fishing preference act, and *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which the Supreme Court of the State of Washington specifically held that a similar Washington statute restricting fishing rights to prior licensees violated the Fourteenth Amendment of the United States Constitution as well as the comparable provisions of the Washington Constitution.

The appellant/defendants at page 17 of their Statement cite several cases involving the application of the Fourteenth Amendment to state regulatory statutes for the proposition that such application involves substantial federal issues. In each instance of consideration by the United States Supreme Court of the issue of the application of the Fourteenth Amendment cited by appellants, a substantial question of applicability existed *and* the decision of *that* question was determinative of the case. In the present case, it is not.

If the court below had ruled that Chapter 186 did not

violate the Alaska Constitution, but did violate the Fourteenth Amendment, then the review of the latter issue might warrant further consideration by the Supreme Court; or if a substantial question as to the application of the State Constitution could be raised, then this court might feel compelled to review this aspect of the decision under the doctrine of *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912), in which the court stated at page 304:

> "The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here."

However, as the decree below is clearly correct under the State Constitution, and no argument is made otherwise by the appellants, there is no basis or necessity for further consideration of other issues by this court.

II. There Is an Actual Controversy Before the Court

At pages 18 and 19 of the Statement, defendants, Commissioner and Board of Fish and Game, assert that no "actual controversy" exists, as required by 62 Stat. 964, 28 U.S.C., §2201 regarding declaratory judgments. It is unquestioned that the plaintiffs were denied net gear licenses in the area of their choice in 1968, and the same statutory and regulatory provisions which excluded plaintiffs in 1968 were in effect and applicable in 1969 at the time this case was submitted.

Appellants make no contention that the licenses would have been granted without the necessity of these proceedings. Their contention apparently is that until there is an actual denial each year of a license, there is no controversy.

The regulations in 1969 were adopted February 12, 1969 (Appx. p. A-5). License applications must be in by April 15 (Appx. p. A-25) for each summer's fishing effort. The timely decision in the present case was only possible because it was commenced in 1968. If appellants' contention as to no controversy were sustained, the plaintiffs as a practical matter could never obtain timely judicial relief.

This same contention was made by the State of Alaska and rejected by the court in the similar situation of preferential fishing rights in *Brown v. Anderson,* 202 F.S. 96 (1962, three-judge D.C. Alaska).

The cases of *Grey v. Saunders,* 372 U.S. 368 (1963); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 156 (1968) and *United States v. Phosphate Export Association,* 393 U.S. 199 (1968), all establish that where the questions are continuing, judicial review cannot be defeated by short term orders, capable of repetition.

The case of *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1947), cited by appellants has not been extended and is entirely dissimilar to the actual, acute controversy in the present case.

Muskrat v. United States, 219 U.S. 346 (1910), involved a situation where there in fact were no conflicting interests between the parties litigant.

It is difficult to conceive of a more actual controversy than in the present case where there is imposed a prohibition of a previously enjoyed means of livelihood. If there

is no substantial question as to the existence of controversy, no further review on this issue appears to be warranted.

III. The Doctrine of Abstention Is Inapplicable and Presents No Substantial Question

At pages 19 thru 21, the appellants contend that the three-judge District Court should have refused to consider the case because the application of a state constitution and statute were involved which had not been but ought first to be interpreted by the state courts, citing *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The doctrine of federal abstention, to the extent it presently exists, is only applicable where the state statute or constitution is so ill defined or uncertain as to be susceptible of an interpretation which would avoid or modify the constitutional issues.

The absence of such uncertainty was recognized in the opinion below in which that court quoted from the case of *Zwickler v. Koota*, 389 U.S. 241 (1967), at page 251, Note 14:

> "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

The language of the statute and of the regulation is perfectly clear and unambiguous and is not susceptible to limiting or interpreting construction.

It has earlier been pointed out that appellant defendants have made no assertion as to how the provisions of

the Alaska Constitution, particularly Section 15 (No Exclusive Right of Fishery) could possibly be construed in a manner which would permit the restrictions imposed by Chapter 186.

The opinion of the Alaska Attorney General, which is the closest authority available at the state level, held a comparable limitation could not be sustained and that a limitation on fishing rights to prior licensees granted a prohibited exclusive right of fishery (Appx. p. A-15, A-20).

Jurisdiction existed in the Federal District Court because there was a substantial Federal constitutional question as found by the three-judge court. It also existed in any event before a one-judge court because of diversity of citizenship. All issues were, therefore, properly before the court and the court was obligated to decide them.

The court below observed:

> "Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable."

There are no "special circumstances" to sustain the doctrine of abstention as required by *Propper v. Clark*, 337 U.S. 472 at 492 (1948).

No case has held that merely because a state statute or constitution is involved, a federal court cannot pass upon these issues. In fact, the leading cases on the issue expressly hold to the contrary—once the federal court has jurisdiction, it may and should decide state as well

as Federal issues. *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1959); *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912); *Michigan Central Railroad v. Powers*, 201 U.S. 245 (1906); *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963).

IV. The District Court Properly Granted Plaintiffs' Motion for Summary Judgment

In plaintiffs' amended complaint at paragraph 9, page 6, it is alleged:

> "The provisions of Chapter 186 of the Laws of Alaska, 1968, . . . are also . . . in contravention of the aforequoted provisions of the Alaska Constitution, to wit, Article I, Sections 1 and 7, and Article VIII, Sections 3, 15, and 17 and of Article I, Section 8, Clause 3 and the Fourteenth Amendment, Section 1 of the United States Constitution in that a right to fishing gear licenses would be denied some applicants equally entitled thereto under the existing law, and an absolute monopoly of gear licenses is granted to those previously licensed in the same area, or who have fished commercially in that area for someone else for three years. A special and exclusive right of fishery is thereby granted on the sole basis of prior entitlement or employment by someone else who has prior entitlement."

In plaintiffs' brief supporting its motion for summary judgment, dated January 18, 1969 at page 8, the argument was advanced:

> "Contrary to the defendants' assertion in some of their argument that anyone can obtain a gear license within three years by commercial fishing during that period, it should be pointed out that the possibility

> of obtaining such a gear license is wholly dependent upon obtaining employment with some fisherman who holds a gear license during the three years involved. If the gear licensees elected to limit employment opportunities to their own families, friends or townsfolk, the employment opportunity could become very scarce. This is particularly true in the Bristol Bay Area where there is only one crewman working with each gear licensee. This factor will become even more critical as the value of the restrictive gear license makes it economically desirable for the licensees to limit the opportunity to others to obtain such a license."

A hearing was held on the motion for summary judgment on February 14, 1969 and in oral argument for the first time, defendants contended that there might be some issue of fact as to whether "under this scheme entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (P. 22, Appellants' Statement quoting from Opinion of Court, App. VII of that Statement.)

From the provisions of the law and regulations, such control over entry into the salmon fishing industry is abundantly clear. As has been indicated previously, there are two requirements before one may fish for salmon commercially in Alaska, to-wit:

1. an individual commercial fishing license; and
2. a commercial fishing gear license.

A person holding an individual commercial fishing license may only fish with licensed gear. 5 A.A.C. 39.120 (b)(1) of the general provisions of the Alaska Commercial Fishing Regulations of 1969 specifies:

> "No person may operate a net and vessel used to take salmon with such net unless the net and vessel are properly licensed . . . for the registration area selected . . ."

Section 16.05.540 Alaska Statutes specifies:

> "The fishing gear licenses . . . shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear."

Since a commercial fisherman is only able to fish by net in the area of his choice if he holds a fishing net gear license or fishes with someone else who has a net gear license, it is obvious that such a person may not acquire three years of fishing experience with net gear in the area unless he can persuade someone who has such a license to permit him to fish on the crew with that person.

> "Under Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, if all of the basic facts are undisputed and the matter is one of interpretation or the reaching of a conclusion by the court, the court may grant a motion for Summary Judgment."

Keele v. Union Pac. R. Co., 78 F.S. 678, 679 (D.C.S.D. Calif. 1948).

Even if it could be contended that there is some issue of fact pertaining to the control by the gear licensees of the entry into the commercial fishing industry under the law and regulations found by the United States District Court to be invalid, plaintiffs may not raise such an alleged issue of fact at this time. Rule 5 H(2) of the General and Criminal Rules United States District Court for the District of Alaska, effective June 1, 1964 as

amended March 1, 1967 specifies with reference to a motion for summary judgment:

> "(2) Any party opposing the motion shall, not later than three (3) days prior to the hearing, serve and file a *concise 'statement of genuine issues'* setting forth all material facts as to which it is contended there exists *a genuine issue necessary to be litigated.*" (Emphasis supplied)

Plaintiffs never filed any "statement of genuine issues" and until oral argument, based their position entirely on the legal consequences of the laws and regulations here involved. It is not permissible for such issues to be raised now before the United States Supreme Court.

CONCLUSION

Appellants have invoked several procedural issues as a basis for further consideration of appeal in this court, but they have failed to demonstrate any prejudice or adverse result from such issues. Unless the issues have a vital and significant bearing on the case, they are not of such significance as to warrant further consideration.

The decision below is clearly sustained by at least one of the grounds discussed in the three-judge opinion, and no issue of sufficient substance or controversy requiring a different result in the case has been submitted by appellants. We therefore urge that the appeal be dismissed or the decree affirmed.

DATED this 2nd of July, 1969.

Respectfully submitted,

FAULKNER, BANFIELD,
BOOCHEVER & DOOGAN
ROBERT BOOCHEVER

ALLEN, DEGARMO & LEEDY
SETH WARNER MORRISON, III
Attorneys for Appellees

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

JOHN BOZANICH, *et al.*, *Plaintiffs*,

v.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska, *et al.*, *Defendants.*

No. J-5-68

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 U.S.C.A. §2281, *et seq.*, on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Boochever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

DATED this 20th day of March, 1968.

.....
WALTER ELY
United States Circuit Judge

.....
RAYMOND E. PLUMMER
United States District Judge

.....
JAMES A. VON DER HEYDT
United States District Judge

Copy received
March ....., 1969
and approved as to form.

.....
Assistant Attorney General
of Attorneys for Defendants

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

JOHN BOZANICH, *et al.*,
Plaintiffs,

v.

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska, *et al.*,
Defendants.

No. J-5-68
OPINION

Endorsed. FILED Feb. 26, 1969
United States District Court of Alaska

By....., Deputy

Before: WALTER ELY, Circuit Judge, and
RAYMOND E. PLUMMER and
JAMES A. VON DER HEYDT, District Judges

ELY, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word

1. Attached as footnote 1 is chapter 186, S.L.A. 1968.
We set forth here the pertinent statute, chapter 186, S.L.A. 1968.

AN ACT

Relating to persons eligible to obtain gear licenses, and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 530-

"gear," in its pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became effective on February 12, 1969.[2] From an examination of the germane provisions of the statute, quoted in the margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitution of the United States and the State of Alaska. There is no

650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

2. We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon

jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded on 28 U.S.C. §1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§2281, 2284. On February 14, 1969, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow.

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registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues are moot. This contention is valid in its application to the plaintiffs' original complaint, which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing thir salmon-catching equipment in certain coastal regions that they desire. Another three-judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson*, 202 F. Supp. 96 (D. Alaska, 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged

gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota*, 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L.ed.2d 444 (1967). In *Zwickler*, the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960.[3] An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safe-

3. Commercial Fishing Regulations, section 102.09(a)(1)(A), (B) (1969), note 2, *supra*. No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2)(1969), also quoted in note 2, *supra*. Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

ty, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud*,[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at

4. 354 U.S. 457, 77 S. Ct. 1344, 1 L.ed.2d 1485 (1957).

> the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.
>
> "To these rules we add the caution that 'Discriminations of an unsual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (Citations omitted)

354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F.2d 447, 450-51 (5th Cir., 1967); *cf. Levy v. Louisiana*, 391 U.S. 68, 71, 88. S. Ct. 1509, 20 L.ed.2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required licenses. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L.ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants

to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character. . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights.'

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Hear, the Board has set specific years in the 1960s, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to section 102.09, the forerunner of the section 102.09 regulations set out in footnote 2, *supra*.

The Alaska Legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the

aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Atorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L.ed.2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy,

is required by Rule 5(H)(2)[5] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the defendants might offer proof that overriding considerations of conservation inspired the adoption of this challenged regulatory scheme. Such proof, whatever it might be, could not alter the result. However worthy or desirable may have been the motives behind the legislation, they cannot cure the obvious constitutional infirmities.

Accordingly, we deny the defendants' motions to dismiss and for summary judgment. We grant the plaintiffs' motion for summary judgment. The enforcement of the 1969 statute and the regulations in question is permanently enjoined. Plaintiffs' counsel will prepare and submit a proposed form of judgment.[6]

Dated this 26th day of February, 1969.

s/WALTER ELY
United States Circuit Judge
s/RAYMOND E. PLUMMER
United States District Judge
s/JAMES A. VON DER HEYDT
United States District Judge

[Certification]

5. This rule, as amended March 1, 1967, reads as follows:
"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

6. Findings of fact and conclusions of law are not required when a disposition is made, such as here, by summary judgment. Fed. R. Civ. P. 52(a). Our opinion recites the essential factual and legal considerations which bear upon the result to which we have been impelled.

APPENDIX C

STATE OF ALASKA

Walter J. Hickel, Governor

Department of Law
Office of the Attorney General
Pouch K, State Capitol—Juneau 99801

February 9, 1968

Honorable Urban C. Nelson, Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: 1968 Commercial Fishing Regulation
Section 102.09 and 104.09

Dear Commissioner Nelson:

We have most carefully and conscientiously examined and reexamined Sections 102.09 and 104.09 of the proposed 1968 Commercial Fishing Regulations in a sincere effort to find a sound legal basis on which to support their validity. We made this special effort because we were mindful of the many days and hours expended by the Board of Fish and Game and by your Department in hearings, deliberations, consultations, and research as well as preparation and drafting for the purpose of arriving at a set of salmon fishery gear limitations which would be sufficient to cope with the tremendous problems involved in protecting the species and avoiding the disastrous economic cycles, particularly in the Bristol Bay area, which recurringly threaten the industry.

We are most hesitant to invalidate the product of so

much hard, conscientious and sincere labor of so many devoted public servants. Nevertheless, we are charged by law with the duty of examining these regulations for their legal validity and moreover will be called upon to defend them against attack in the courts which may be confidently expected to materialize in the fact of such significant exercise of the state police power.

We have reluctantly come to the conclusion that we cannot sustain the validity of these regulations as presently proposed for the following reasons:

1. With respect to Section 104.09, governing Salmon Registration Area T, we do not believe that the point-credit system for 1968 or its continuation for years subsequent to 1968, as set forth in subsections (a) and (b) of the cited section, can be sustained because, instead of being based upon a broad historical period and all available statistical records, it arbitrarily selects the 1967 season as the only qualifying test. Moreover, we feel that elimination of all other pertinent tests of qualification and concentration of prior registration during the 1967 Bristol Bay fishing season is so narrow as to invite a finding that it is arbitrary because it is lacking in reasonable classification and because there is no rational connection between the biological, social and economic factors underlying the Bristol Bay fisheries emergency and the remedy adopted by the regulation.

In fact, Section 102.09 suffers from the same type of deficiency since only those who obtained year licenses in 1966 or 1968 are allowed to fish in the remaining salmon registration areas of the state.

A statute containing provisions similar to Section 102.09

of the proposed regulations was challenged in the case of *State ex rel. Bacich v. Huse*, 59 P.2d 1101 (Wash., 1936). The statute permitted only those persons who had held salmon gill net licenses in 1931 or 1932 to purchase salmon gill net licenses in 1933. No provision for new entrants was embodied in the statute.

The Washington Supreme Court held that the statute violated the Fourteenth Amendment of the United States Constitution for two reasons. 1) it set up a special privilege in a few people without justifiable reason for the selection of the privileged few (discussed more fully below), and 2) the choice of the base years was "not predicated on any fair, just ar natural basis of selection, but [was] wholly arbitrary and capricious." The court stated:

> The classification made by section 4 of the [Washington] act in question can have no natural, reasonable or just relation to the subject matter of the act. If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state. The selection rests upon mere accidnt or circumstance, and not upon conditions effecting a natural line of cleavage. We are of the opinion, and hold, that section 4 of the act . . . is unconstitutional and void. (*Supra* at 1105)

In another case, *Rabin v. Connor*, 174 So.2d 721 (Fla.

1965), a serious economic problem in the celery industry of Florida had prompted the legislature to conduct an extensive study of the industry. As a result of the legislative findings an act was passed and regulations were promulgated which made the amount a celery producer could sell dependent upon the amount he had sold in two past celery seasons. Provision was even made for issuance of a very small number of temporary certificates to producers who had not grown celery in the two designated seasons.

The Supreme Court of Florida held that the statute and regulations violated the Fourteenth Amendment to the U.S. Constitution. The Court said:

> In determining the validity of legislation and orders of the kind involved here, the vital factor to be considered is the practical effect and impact thereof . . . The practical effect of this marketing order is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny others the right to participate at all.
>
> . . . It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and denial of equal protection of the law. . . . (*Supra* at 725)

2. We believe that Sections 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet constitutional requirements. The United States Constitutional requirements in this regard were discussed above in connection

with the *Huse* and *Rubin* cases and will not be further expounded upon here. However, there are two Alaska constitutional provisions (in addition to the provisions which parallel the U.S. Constitution) which are also violated by these regulations.

Article 1, Section 15 of the Alaska Constitution provides in pertinent part:

> . . . No law making any irrevocable grant of special privileges or immunities shall be passed . . .

Similar provisions in other state constitutions have been held to mean that a state may not grant an exclusive right to fish to a person or a specific group of persons. 36A C.J.S. Fish Section 36, page 562. *State ex rel. State Game Commission v. Red River Val. Co.*, 182 P.2d 421 (N.M., 1946).

However, perhaps the most pertinent provision of the Alaska Constitution is Article VIII Section 15 which provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.

The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the following commentary on Section 15 to the Convention:

> Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the pro-

> vision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added.) "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.

In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), the U.S. Supreme Court in interpreting the White Act stated:

> "Exclusive," as used in Section 1 (of the White Act) . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few. (*Supra* at 122)

In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in Sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license.

3. In addition the general moratorium applicable to salmon fishery in all areas of the state (Section 102.09)

cannot be sustained in view of the fact that the specific limitations imposed upon the issuance of salmon gear licenses in the Bristol Bay disaster area have been pegged to the highest number historically issued in that area. Had there been a drastic reduction in the total number of licenses to be authorized from that experienced in the past year or two, it could have been successfully argued that an overall moratorium was necessary to avoid a mass exodus of salmon fishermen from the Bristol Bay area, resulting in an overflow into other fishing areas of the State. In the absence of such economic and historical justification, we believe that Section 102.09 would be struck down as being in excess of the police power of the State and in violation of equal protection and due process clauses of the Federal and State Constitutions.

4. Finally it is our opinion that the authority delegated the Board under A.S. 16.05.250 does not include the power to establish age limitations of the type contained in Section 104.09. As stated an A.S. 44.62.020:

> . . . to be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Let me again reiterate and stress the great reluctance with which we have reached the foregoing conclusion. We feel however, that to ignore our serious legal doubts and to permit these regulations to take effect only to find them immediately attacked in the courts and then perhaps set aside right at the beginning of the fishing season, would do a great disservice to all concerned.

We regret the delay in transmitting these observations and recommendations, which was occasioned by our great

desire to explore every possible avenue which would avoid questioning the validity of these carefully considered regulations. We continue to stand ready to work with your department and with the Board in a continued effort to promulgate regulations or to recommend legislation which would solve these great problems within the legal framework of our Federal and State Constitutions and laws.

Sincerely yours,
EDGAR PAUL BOYKO
Attorney General

EPB:mmm

cc Honorable Walter J. Hickel
Governor of Alaska
Chairman of the Board of Fish & Game
Members of the Board of Fish & Game
Secretary of State

APPENDIX D

ADDITIONAL SELECTED ALASKA COMMERCIAL FISHING STATUTES AND REGULATIONS

Alaska Statutes

Sec. 16.05.480. *Commercial Fishing License.* (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $10 for residents, and $30 for non-residents. All commercial fishing licenses are nontransferable and shall be retained in the possession of the licensee, readily accessible for inspection at all times.

Sec. 16.05.540. *Limitation on issuance of fishing gear licenses.* The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 16.05.670. *Fishing gear license in general.* (a) A fishing gear license issued under secs. 550, 560, and 590-650 of this chapter may be transferred only if sickness, injury, death, unavailability or other incapacitation of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other licensed fishing gear to take its place. A fishing gear license issued under secs. 570 and 580 of this chapter may be transferred only if sickness, injury, or death of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other

licensed fishing gear to take its place. . . . (e) It is unlawful for gear which is licensed as provided in this chapter to be operated or caused to be operated by a person other than the licensee or the person to whom the license was transferred upon notice to the department.

Alaska Administrative Code

5 AAC 39.110. COMMERCIAL FISHING LICENSES AND REGISTRATION.

(a) All commercial fishermen shall have their commercial fishing licenses before fishing in any waters of Alaska.

(b) Not more than one commercial fishing license may be obtained by a person during any one calendar year.

(c) The following provisions apply to salmon net fishermen:

(1) Each salmon net fisherman shall be properly licensed, and registered in the registration area of the fisherman's choice as set out in sec. 120(d)(1) of this chapter.

(2 The license shall be valid for salmon net fishing only in the area that appears on the license.

(3) Upon request, the commissioner shall permit the license to be transferred to another registration area if the fisherman does not hold a salmon net gear license in either area and such transfer will not jeopardize proper conservation.

5 AAC 39.120. LICENSES AND REGISTRATION OF FISHING VESSELS AND GEAR.

(a) No person may operate a vessel and gear to take fish in an area of intended operation unless the vessel and gear have been registered with the local representative of the department. Registration, with the exception of salmon net and king crab fishing, may be done any time to commencing fishing. This does not apply to halibut fishing.

(b) Salmon fishing net and vessel license and registration requirements are as follows:

(1) No person may operate a net, and vessel used to take salmon with such net, unless the net and vessel are properly licensed and registered not later than April 15 of the year of operation for the registration area selected, except in the Arctic-Yukon-Kuskokwim area where the registration date shall be June 1 for the Yukon district. In the remainder of the Arctic-Yukon-Kuskokwim area, registration shall be at any time before commercial fishing.

(2) Registered nets and vessels shall be used to take salmon only in the one area for which they are registered.

(3) The late registration, or the transfer of registered nets or vessels to another registration area shall be permitted by the commissioner only in the case of serious injury, sickness or death, or loss of vessel by sinking,

destruction or extensive mechanical breakdown.

. . . .

(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:

(1) Salmon registration areas are:

Code Letter	Area
A —	Southeastern Alaska area
D —	Yakutat area
E —	Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area
K —	Kodiak area
L —	Chignik area
M —	Alaska Peninsula area and Aleutian Islands area
T —	Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area
W —	Kuskokwim district of the Arctic-Yukon-Kuskokwim area
X —	Kotzebue district of the Arctic-Yukon-Kuskokwim area
Y —	Yukon district of the Arctic-Yukon-Kuskokwim area
Z —	Norton Sound district of the Arctic-Yukon-Kuskokwim area.